THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-Reportable

Case no: 079/2018

In the matter between:

NKOSINATHI WISEMAN MNGOMEZULU **APPELLANT**

and

ETHEKWINI METROPOLITAN MUNICIPALITY **RESPONDENT**

Neutral citation: *Mngomezulu v Ethekwini Metropolitan Municipality* (079/2018) [2019] ZASCA 91 (03 June 2019)

Coram: Leach, Dambuza, Molemela and Schippers JJA and Eksteen AJA

Heard: 03 May 2019

Delivered: 03 June 2019

Summary: Delict – claim for damages for unlawful destruction of property and unlawful assault – plea of self-defence raised – no proof that claimant acted lawfully in defence of property – defensive action must be reasonable and taken against imminent act of aggression.

ORDER

On appeal from: KwaZulu-Natal Division, Durban (Pillay J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Dambuza JA (Leach, Molemela and Schippers JJA and Eksteen AJA concurring):

Introduction

[1] The appellant, Mr Mngomezulu, appeals against an order of the KwaZulu-Natal Division of the High Court (Pillay J), hereafter the High Court, in terms of which his claim against the respondent for damages, based on alleged unlawful demolition of his informal dwelling and being shot by the respondent's functionaries, was dismissed. The appeal is with leave of the High Court.

Background

[2] On 28 March 2013 the Member of the Executive Council for Human Settlements and Public Works for the Province of KwaZulu-Natal (MEC), having experienced an increase in illegal settlements on vacant land located in various areas under his department's jurisdiction, obtained an interdict in the high court (the March order per Koen J), directing the Ethekwini Metropolitan Municipality (the Municipality), as the governmental authority responsible for making land available for implementation of the government's social housing policy, assisted by members of the South African Police Service (SAPS), to 'take reasonable and necessary steps to prevent any persons from

invading, occupying, constructing structures and/or placing any material upon the immovable properties' in question. It also authorised the Municipality and the police to demolish and remove structures that had been built on the identified land.

[3] The portions of land relevant in these proceedings (to which the March order related) were lots 17, 18 and 19 of Erf 960, located in a forested area on the edge of the Cato Crest informal settlement in Durban. Armed with this order, the Municipality embarked on rolling evictions of residents from the identified areas and demolition of their informal dwellings. The Cato Crest informal settlement residents, assisted by the social movement known as Abahlali Basemjondolo, instituted court proceedings against the Municipality and the MEC, challenging the evictions. On 22 August 2013, the Constitutional Court granted a provisional court order which incorporated an undertaking by the Municipality and the MEC that they would stop evicting the residents until the March interim order was finalised.

[4] Subsequent to the court order of 22 August 2013, further demolitions occurred. Thereafter a series of other court orders were obtained by the residents as the Municipality, through its land invasion unit (LIU), continued to demolish what it considered to be newly built structures. According to the Municipality the further demolitions were limited to new dwellings, built subsequent to the order of 22 August 2013.The Municipality insisted that it was bound to comply with the March order which remained extant.

[5] On the morning of 21 September 2013, as the LIU, led by Mr Gavin Le Cordier, was preparing to resume with the demolitions, Mr Mngomezulu, armed with a long piece of sharpened metal that he described as a spear and a shield, confronted Mr Le Cordier. The different versions on what exactly happened during this incident are discussed later in this judgment. By the end of that confrontation Mr Mngomezulu had sustained 4 gunshot wounds to the abdomen whilst Mr Le Cordier sustained a superficial stab wound to the stomach. As a result of this incident Mr Le Cordier spent a night in hospital whilst Mr Mngomezulu spent about a month and a half under police guard in hospital, and thereafter, was detained in prison for a further period. A charge of attempted murder which

was proffered against Mr Mngomezulu was later withdrawn as the public prosecutor declined to prosecute.

The high court proceedings

[6] On 27 October 2014, Mr Mngomezulu instituted proceedings in the high court, claiming damages against the Municipality and the Minister of Safety and Security for unlawful demolition of his dwelling, the assault on him and unlawful arrest and detention. The Municipality pleaded that Mr Le Cordier had shot Mr Mngomezulu in self-defence as he (Mr Mngomezulu) had attacked him with a spear. It also pleaded that it demolished the dwellings at the Cato Crest settlement in execution of the high court interim order in terms of which it was ordered to prevent settlement on the identified portion of Erf 960.

[7] At the trial the Municipality's version of the incident was that on the morning of 21 September 2013, whilst Mr Le Cordier and his LIU team were preparing to start the removal of newly built structures from portions 17, 18 and 19 of Erf 960, Mr Mngomezulu approached some members of the LIU team, singing and dancing, brandishing a weapon, his spear in one hand, and a 'plastic lid' which he held as a shield, on the other. Members of the LIU chased him away. For a while it appeared that he had left, but he made a second approach, this time to a different group of LIU members elsewhere on the property. Mr Le Cordier was in this group. Mr Mngomezulu approached Mr Le Cordier, still brandishing the spear, shouting and singing. He ignored Mr Le Cordier's repeated instructions to leave the scene. As he continued to approach, Mr Le Cordier fired tear gas filled plastic balls from a 'paintball marker'. Undeterred, Mr Mngomezulu continued to approach. Mr Le Cordier exchanged the paintball marker for a firearm, a 9mm pistol. He then fired four shots into the ground, at the same time warning Mr Mngomezulu, verbally, to turn back. As Mr Mngomezulu continued to advance Mr Le Cordier stepped back and, as he did so, he tripped and fell. Whilst he was on his back on the ground Mr Mngomezulu stabbed him in the abdomen with the spear and immediately prepared for a second stab. Fearing for his life, Mr Le Cordier fired three shots at him, hitting him in the abdomen. Only at that stage did Mr Mngomezulu run away.

[8] Mr Mngomezulu's version was that he came to settle on the land in question in May 2013. His first encounter with Mr Le Cordier was in the afternoon the day before the incident, when he (Mr Le Cordier) and his team came to demolish dwellings at the Cato Crest settlement. Mr Mngomezulu unsuccessfully tried to stop the demolitions by showing Mr Le Cordier a copy of an interdict which prohibited the demolitions. The demolitions proceeded and Mr Mngomezulu's dwelling was amongst the structures that were destroyed on that day. His version was that his dwelling was situated outside lot 17, 18 and 19 of Erf 960 and therefore the March order did not apply to it. After the LIU members left the settlement, community members started re-building the demolished structures.

[9] The following morning, as members of the LIU prepared to resume the demolitions, Mr Mngomezulu and two companions approached Mr LeCodier. Mr Mngomezulu was carrying a cast iron tool with which he had been rebuilding his demolished dwelling. When they were about seven metres from the members of the LIU, Mr Le Cordier fired shots at them, at first 'with rubber bullets' and later with a 'shot gun'. Mr Mngomezulu was struck by a bullet, but he instructed his two companions to turn back whilst he continued to advance on Mr Le Cordier alone. As Mr Le Cordier tried to retreat he tripped on a tree and fell, and his firearm fell out of his hand. Mr Mngomezulu then struck him with the iron tool. According to Mr Mngomezulu the shooting was unjustified as he was defending his home against the unlawful attack which had happened the previous day.

[10] In dismissing the claim, the high court found that Mr Mngomezulu had failed to prove that the LIU had in fact demolished his home. More particularly he had failed to prove that he even had a structure located outside the affected area. The court accepted the version tendered by the municipal functionaries, that they only demolished uncompleted and uninhabited structures located on portions 17, 18 and 19 on Erf 960 (also described as outside the woods) as per the March court order. It found that Mr Mngomezulu was evasive when giving evidence and was a dishonest and unreliable witness. He had denied to the police that he had stabbed Mr Le Cordier. Despite these findings the claim for unlawful arrest and detention succeeded against the Minister of Safety and Security because the arresting police officer never gave evidence to show why it had been decided to arrest Mr Mngomezulu.

Submissions on appeal

[11] Mr Mngomezulu's contention was that the High Court's adverse credibility findings were unjustified in the face of the common cause facts that he was well known and supported by other members of the Cato Crest community and that he had been rebuilding his shack on the morning of the incident. His version that he had a home in the area and that his home was destroyed by the employees of the Municipality was satisfactorily established, so it was submitted.

[12] Mr Mngomezulu also contended that the Municipality's plea of self-defence was misplaced as it was members of the LIU that invaded the settlement and demolished homes. He had approached Mr Le Cordier in defence of his and his neighbours' homes, as he was entitled to do. His approach was never threatening. He only had in his possession the 'tools' that he had been using to rebuild his demolished shack. Although he was entitled to attack Mr Le Cordier in defence of the demolished homes, his intention was to only remonstrate with him. There was no justification for shooting at him. Notably, however, although it was common cause that certain structures had been demolished by the LIU, only Mr Mngomezulu testified to having had a home amongst the destroyed structures.

Discussion

[13] It is important, firstly, to observe that the onus was on Mr Mngomezulu to prove destruction of his dwelling. In the summons he pleaded that on 21 September 2013 he had been on his way home when he was 'unlawfully assaulted and shot by uniformed members or employees of [the Municipality's] Police Division' who also demolished his home and personal belongings. During cross examination Mr Mngomezulu's version changed. It was put to Mr Le Cordier that he was stabbed while Mr Mngomezulu 'was defending his home against an unlawful attack'. However, his evidence was that his dwelling was destroyed on the afternoon preceding the incident. And at the hearing of the appeal the contention was that he was defending his home and the homes of his fellow community members when the incident happened.

[14] Contrary to the submissions made on Mr Mngomezulu's behalf the credibility findings made by the high court find support in the record. He had difficulty in explaining his use, on his hospital and other records, of addresses other than where his dwelling was allegedly situated. His explanation was that he did not understand English. This was inconsistent with the lengthy discussion that he had allegedly held with Mr Le Cordier on the afternoon preceding the incident, trying to convince him and his colleagues that the demolitions were prohibited in terms of a court order. Further, certain material details of his version were never put to the municipal witnesses. It was not put to Mr Le Cordier that Mr Mngomezulu was in the company of two people when the incident occurred. He also could not explain why Mr Le Cordier shot at him when he was in the company of two other men. Neither could he explain why he failed to divulge in his complaint about the shooting to the police, that he was armed when he approached Mr Le Cordier, and that he stabbed him during the incident. Interestingly, the evidence of his witness, Mr Sibusiso Zikode, was that Mr Mngomezulu was not armed at the time of the incident.

[15] On the other hand, no criticism was levelled at the evidence tendered on behalf of the Municipality. Neither were any adverse credibility findings made by the High Court. The high watermark of Mr Mngomezulu's case was that Mr Le Cordier could not be certain that structures located outside Portion 17, 18, and 19 of Erf 960, where Mr Mngomezulu's structure was allegedly located, were demolished. Yet Mr Le Cordier had repeatedly denied in his evidence that there were such demolitions. Even if he could not be certain on this aspect there had to be credible evidence to prove the allegations made. On a balance of probabilities, Mr Mngomezulu failed to prove that he indeed did have a home that was destroyed by municipal employees as alleged.

[16] Ultimately, the evidence proved that Mr Mngomezulu approached members of the LIU armed with a spear. He ignored Mr Le Cordier's repeated warnings for him to turn back. He was undeterred by the paintball marker shots. He was unfazed by Mr Le Cordier's exchange of the paintball marker for a firearm. He continued to advance on Mr Le Cordier even after the shooting had started. All this persistence accords with the finding by the High Court that he was the aggressor. The conclusions by the high court that he was the attacker and that Mr Le Cordier shot him in self-defence were correct. Mr Le

Cordier's multiple shots were a desperate last resort self-defence. Had he not fired he would undoubtedly have been seriously injured by being stabbed whilst lying helpless on his back on the ground. The shooting was a reasonable measure to protect his life in the circumstances.

[17] Ordinarily Mr Mngomezulu had the right to defend his neighbours' property in appropriate circumstances. Every right or legally protected interest, including the right or interest of a third party, can be protected by an act of defence.[1] But Mr Mngomezulu had the onus to prove that his action in approaching and assaulting Mr Le Cordier with the spear was legitimate defensive action. The onus entailed not only asserting that the assault on Mr Le Cordier was taken as defensive action, but also that it was reasonable defensive action, taken against an imminent act of aggression.[2] Future danger, danger which is not imminent or conduct that has ceased to constitute danger does not entitle one to raise the defence.[3] The act of defence is justifiable only if objectively, it was reasonably necessary for the purpose of protection of and was not excessive to the threatened harm.[4] Moreover, although proportionality of conflicting interests is not a strict basis for determination of justifiability, extreme disproportionality renders the defensive action unjustifiable.

[18] In this case, as stated, there was no evidence of people having lost their homes and belongings. Only newly built, incomplete and uninhabited structures were destroyed. No one was killed or even injured during the demolitions. Mr Mngomezulu had no right to attack Mr Le Cordier with a spear as he did. His defensive action was unreasonable in the circumstances.

Costs

[19] Counsel for Mr Mngomezulu submitted that in the event of the appeal being dismissed no costs order should be made against Mr Mngomezulu as he was vindicating his constitutional right of resisting eviction from his home by the state. The principle which

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[1] 15 *Lawsa* 3 ed at 228.
[2] Ibid at 227. See *S v Mogohlwane* [1982] 3 All SA 483 (T); 1982 (2) SA 587 (T).
[3] Ibid.
[4] Ibid at 228.

Mr Mngomezulu invokes provides that an unsuccessful litigant in constitutional litigation against the State ought not to be ordered to pay costs, unless the proceedings are frivolous or vexatious or in any other way manifestly appropriate.[5] It is aimed at preventing 'the chilling effect that adverse costs orders might have on litigants seeking to assert their constitutional rights'.[6] It is important to highlight that the principle applies in respect of constitutional litigation. Even then, it is not a rule of rigid application. It is also not intended to promote 'risk-free' constitutional litigation.[7] The court still has a discretion to order costs in appropriate circumstances.[8]

[20] More importantly for this case, the general rule in civil litigation that costs should follow the result remains applicable. This case is distinguishable from *Biowatch*, *Harrielall* and other cases in which constitutional rights were invoked. Mr Mngomezulu claimed delictual damages for destruction of his property and unlawful assault. He did not seek to vindicate any constitutional rights or any issue of public importance. That was done in the various applications in which it was sought to stop the evictions. The distant connection between the claim for delictual damages and the evictions does not imbue these proceedings with a constitutional nature. There is no reason why the costs should not follow the event.

[21] The appeal is dismissed with costs.

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N Dambuza

Judge of Appeal

Molemela JA

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[5] *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 23.
[6] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC) para 11.
[7] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45, 2017 (1) SA 645 (CC) para 18
[8] *Biowatch* supra fn 5 para 19.

[22] I have had the benefit of reading the majority judgment penned by my sister, Dambuza JA. I agree that the appeal against the order of the court a quo pertaining to the merits falls to be dismissed. My respectful disagreement with my colleague's proposed order relates only to the issue of costs. I am of the view that the *Biowatch* principle is applicable in relation to the cost orders pertaining to the claims for compensation for destruction of property and damages for assault. I also hold the view that each party must pay its own costs of the appeal. The reasons for my disagreement with the majority judgment on the costs issue are set out hereunder.

[23] In the course of adjudicating the matter, the court a quo bemoaned, correctly in my view, the attitude of the first respondent in purporting to execute a court order (the March order) that had already been set aside by a subsequent court order. The court a quo's stance on the issue was well articulated in its judgment. I can do no better than to quote the relevant passages *verbatim*. It stated inter alia as follows:

'[38] . . . Seized with demolition and eviction matters, courts are enjoined by the Constitution to consider all relevant circumstances. The March order was granted urgently, collaboratively without opposition from Ethekwini (which provided the evidence for the application) and SAPS, without notice to the occupiers and consequently without "considering all the relevant circumstances".

[39] Second, the March order was overtaken by the August and subsequent orders. Practically the LIU could not implement the March order without violating the subsequent orders. The order directing that the marking of the sites has yet to be undertaken.

[40] Third, municipalities have a 'direct and substantial' interest in litigation that results in homelessness. They have been joined in such litigation because their constitutional obligations to the homeless are automatically engaged when courts grant eviction orders. Consequently Ethekwini's application for the March order was extraordinarily insensitive to its constitutional commitments.

[41] Fourth, the March order was a nullity. It was sought and obtained without notice to the plaintiff and occupiers of the informal settlement. Ethekwini proffered no evidence that it served the March order on the plaintiff or anyone else. Effectively, the March order was granted without having afforded the owners and (potential) occupiers of the shacks an opportunity to be heard

before the shacks were demolished. Consequently the March order was not binding on them. In all the circumstances, to persist in these proceedings on relying on it again signals intransigence on the part of Ethekwini.

[42] Against this background, counsel for the plaintiff submitted that by the LIU repeatedly defying the August and September court orders it provoked the plaintiff to resist the demolitions with force. Mr Kippen who accompanied Mr Le Cordier conceded that the occupiers would not have been aware of the intention of members of the LIU to demolish only unoccupied shacks; consequently their response to the demolitions was predictably hostile.

[43] The March order on which Ethekwini relied to effect the demolitions did not cite the plaintiff as a party. This is immaterial to determining the lawfulness of the conduct of the members of the LIU in violating the August and September court orders.

[44] There is a steady line of cases from the appellate courts that impose an obligation on local authorities to engage meaningfully with unlawful occupiers of land. Surprisingly, Ethekwini sought and secured the March order apparently without any engagement. Counsel for Ethekwini submitted that any engagement was not possible because the shacks demolished had no occupants. But the structures were shacks for human occupation. Human hands were involved not only in the construction of the shacks but also in the procurement of the materials, plans to occupy the structures once built and to rebuild them once demolished. Evictions and homelessness were inevitable. Thus, even if the shacks were unoccupied, members of the LIU ought reasonably to have anticipated that the destruction of the unoccupied structures would lead to homelessness. Instead of avoiding homelessness, Ethekwini created it. Worse still, it doggedly continued to demolish the shacks in the face of escalating resistance. Seeking out and engaging meaningfully with those affected was Ethekwini's constitutional duty.

[45] If Ethekwini attempted to engage meaningfully with the occupiers of the informal settlement at Cato Crest it led no such evidence. The court acknowledges that Ethekwini's duty to engage meaningfully would not have been easy. Evidence of protests by the community against the respondents' employees on at least three instances that surfaced in this trial suggests that the informal settlement community was unapproachable for dialogue. Ethekwini would not be able to fulfil its constitutional responsibilities if the community fails or refuses to engage meaningfully. Nor can peaceful solutions be found if the community's ostensible demand is for social housing but its protest actions are for some other unarticulated purpose.' (Footnotes omitted).

[24] I am in respectful agreement with the views expressed above. In my view, the remarks made by the court a quo loudly attest to the applicability of the *Biowatch* principle to this litigation and thus constitute the very reasons that should have prompted the court a quo to exercise its discretion in favour of applying the *Biowatch* principle. It did not do so.

[25] It is trite that in awarding an order of costs the court of first instance exercises a discretion. A court of appeal will not readily interfere with that discretion. It is well-established that the discretion must be exercised judicially, having regard to all the relevant circumstances.[9] The power to interfere on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question.[10]

[26] Section 172 of the Constitution vests in a court wide remedial powers when dealing with constitutional matters.[11] In terms of this provision a court may make any order – including a costs award – that is just and equitable. Clearly, the nature of the dispute is a relevant consideration in the determination of a costs award. It is abundantly clear from the passage quoted above that the court a quo considered the appellants claim for compensation for destruction of his property to have raised constitutional issues. Certainly, the claim for compensation for destruction of the appellant's dwelling unquestionably raises constitutional issues. The following remarks made by the Constitutional Court in *Machele & others v Mailula & another* [12] are apposite:

'Widespread removals of people from one area to another occurred frequently. This history is well known. We now have a Constitution which specifically protects against arbitrary evictions. In my view, an eviction from one's home will always raise a constitutional matter. Further, in the *Jaftha* case, Mokgoro J said that "at the very least, *any measure* which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)." It follows that the relief sought by the applicants raises a constitutional matter.' (Footnotes omitted)

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[9] *Affordable Medicines Trust & others v Minister of Health & others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 138.
[10] *Attorney-General for Eastern Cape v Blom & others* 1988 (4) SA 645 AD at 670D.
[11] *Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo & another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) para 97.
[12] *Machele & others v Mailula & another* [2009] ZACC 7; 2010 (2) SA 257 (CC) paras 26-27.

[27] With regards to this matter, the incident pertaining to the alleged destruction of the appellant's dwelling on 21 September 2013 was yet another incident of a series of unlawful evictions that had been executed by the first respondent on the strength of the March order. it is of significance that the same order the respondents relied upon in effecting the evictions has been an issue for consideration by the Constitutional Court in *Zulu & others v Ethekwini Municipality & others*,[13] albeit in a slightly different context. In that regard, the court held as follows:

'Preventing the appellants from continuing to occupy the property would amount to their eviction because they would be precluded from either returning to their homes after a temporary absence or because they would be kicked out of their homes to prevent them from continuing to occupy the property. This means that, to this extent, that part of the interim order is an eviction order.'[14]

[28] It was stated in *Lawyers for Human Rights v Minister in the Presidency & others*[15] that the well-established test when considering whether to award a costs order against a private party in constitutional litigation is whether the litigation in question was frivolous, vexatious or manifestly inappropriate. The court stated that 'to be subject to an adverse costs order, the litigant's conduct must be worthy of censure.'[16] In this matter, it is self-evident from the court a quo's own remarks that the appellant's main objective was to vindicate his constitutional rights. It did not find that the appellant's claim was vexatious. I am of the view that there are simply no facts that suggest that his claim was vexatious. Since the appellant's claim for compensation for destruction of his dwelling raised constitutional issues, it fell squarely within the purview of the *Biowatch* principle. Against the face of ongoing unlawful evictions, the fact that other unlawful occupiers had previously obtained relief could hardly be a factor that could tip the scales into granting an adverse order of costs in relation to a dispute pertaining to fresh demolitions. The court a quo should therefore have applied the *Biowatch* principle despite dismissing the appellant's claim for compensation for destruction of his property. After all, the dismissal of

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[13] *Zulu & others v Ethekwini Municipality & others* [2014] ZACC 17; 2014 (4) SA 590 (CC); 2014 (8) BCLR 971 (CC).
[14] *Zulu* supra para 25; also see para 39.
[15] *Lawyers for Human Rights v Minister in the Presidency & others* 2017 (1) SA 645 CC para 7.
[16] Ibid.

that matter did not detract from the nature of the claim. It remained a dispute relating to eviction and thus raised a constitutional issue.

[29] As regards the remaining claim for damages for assault, which was also correctly dismissed by the court a quo, I hold the view that the dismissal of that claim should not, without more, have been accompanied by an adverse order of costs. The majority judgment found that the appellant did not seek to vindicate any constitutional rights or any issue of public importance. It further found that there is a distant connection between the claim for delictual damages and the evictions. I respectfully disagree.

[30] In my view, the court a quo ought to have taken the context in which the incident happened, into account. The assault incident occurred in the course of the unlawful evictions and is thus closely linked to the constitutional issue that was raised. The unlawful evictions taking place on the day in question therefore constitute a backdrop which gives a slightly different hue to the run of the mill delictual claim of assault. This much was conceded by the court a quo in paragraph 35 of its judgment. Although the appellant was unsuccessful in relation to the claim, the conduct of the first appellant in relation to his unsuccessful claim ought to have been considered in its proper perspective. That context is this: the alleged assault occurred in the course of the first respondent's execution of unlawful demolitions. The following remarks of Sachs J in *Port Elizabeth Municipality v Various Occupiers*,[17] in relation to s 26(3) of the Constitution underscore the importance of having a roof over one's head and therefore shed some light on the desperation that unlawful occupiers may experience when faced with the possibility of losing their shelter:

'… a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world.'[18]

[31] That the context in which an unsuccessful claim arose is a relevant consideration is evident from the following remarks by the court in *Hotz & others v University of Cape Town*:[19]

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[17] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[18] *Port Elizabeth* supra para 17.
[19] *Hotz & others v University of Cape Town* [2017] ZACC 10; 2018 (1) SA 369 (CC) para 34-35.

'Whilst the applicants' conduct went beyond the boundary of a peaceful protest, the constitutional context should have been taken into account. It cannot be gainsaid that the issue they raised was of genuine constitutional import. Although the applicants were unsuccessful, the Court should have considered the chilling effect the costs order would have on the litigants, in the context of constitutional justice. The Court erred in not doing so.

It is correct that there are exceptions to the general rule that in constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be mulcted with costs as they may have a chilling effect on them. One of the exceptions, that justify a departure from the general rule, is where the litigation is frivolous or vexatious. Here, the applicants' opposition to UCT's application in the High Court was clearly not frivolous or vexatious.'

[32] The court a quo did not, in its judgment, specifically address itself to the issue of costs. It advanced no reasons for deviating from the *Biowatch* principle in respect of the claim for compensation for destruction of property. In relation to the assault claim, it did not take context into account. Had it done so, it would have applied the *Biowatch* principle. As stated before, an award of costs involves the exercise of a discretion. In the absence of any reasons for making an adverse cost order, the ineluctable inference is that it did not exercise its discretion at all. That constitutes a material misdirection. That being the case, this court is at large to substitute its own exercise of discretion. To the extent that it may be argued that the sentiments expressed in the passage quoted from the court a quo's judgment evidence an exercise of its discretion, then its discretion was not exercised judicially as the circumstances of this matter do not justify an adverse order of costs. A failure to exercise a discretion also amounts to a material misdirection entitling this court to interfere.[20]

[33] In conclusion, I have shown above how the appellant's claim for compensation for destruction of his dwelling property, which is a claim raising constitutional issues, gave the claim for damages for assault a different context to an ordinary delictual claim, thus warranting the application of the *Biowatch principle*. The same reasoning I have applied to the award of costs by the court a quo is equally applicable to the costs of the appeal. I

[20] *Trencon Construction Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015(5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

would therefore uphold the appeal only in respect of the costs order and order each party to pay its own costs in respect of the appeal.

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M B Molemela

Judge of Appeal

APPEARANCES:

For Appellant:	Adv de Vos SC (with Adv de Vos) Instructed by: Seri Law Clinic, Johannesburg Webbers Attorneys, Bloemfontein
For Respondent:	Adv Broster Instructed by: Mchunu Bulose & Partners, Durban Moroka Attorneys, Bloemfontein